STATE OF MICHIGAN
IN THE SUPREME COURT

BODDY CONSTRUCTION COMPANY, INC.,

Plaintiff-Appellee,

v

~~STATE OF MICHIGAN~~, MICHIGAN DEPARTMENT OF TRANSPORTATION,

Defendant-Appellant.
_____/

Michigan Supreme Court No.

Court of Appeals No. 237471 Opn 2/28/03 Reh 4/18/03

Court of Claims No. 00-17592-CM P. Houk

123833 AFL 6/3 39349

APPLICATION FOR LEAVE TO APPEAL

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QUESTIONS PRESENTED FOR REVIEW

I. **Where the parties contractually agreed that a claim is barred unless MDOT is given timely written notice of the intent to file a claim, and where Boddy admitted that notice was not so given, did the Court of Appeals err in reversing the Court of Claims and ruling that MDOT "agreed" to waive the notice requirement when the ruling was not supported by the record?**

II. **Where the record shows there to have been a lack of substantively admissible evidence to create a genuine issue of material fact as to whether Boddy is entitled to additional compensation for its highway construction, did the Court of Appeals err in ruling that there exists a genuine issue of material fact?**

STATEMENT OF ORDER APPEALED FROM, GROUNDS, AND RELIEF SOUGHT

Appellant Michigan Department of Transportation (MDOT) appeals from the February 28, 2003 opinion of the Court of Appeals, which reversed a Court of Claims decision and remanded a portion of the matter for further proceedings. The Court of Appeals ruled that MDOT waived strict compliance with a term in a highway construction contract and that a fact question existed as to whether Appellee Boddy Construction Company was entitled to additional compensation for its highway construction work. The Court of Appeals also denied MDOT's Motion for Rehearing on April 18, 2003.

Grounds for granting this Application exist under MCR 7.302(B)(2), (3), and (5).

First, this case presents an issue of significant public interest, and it is against a state agency. The Court of Appeals refused to enforce a plain and unambiguous contractual provision requiring a highway contractor to give written notice to MDOT before commencing work for which the contractor intends to file a claim for additional compensation. If MDOT is not allowed to enforce that clause, it will be unable to evaluate claims at a point in time when it is possible to mitigate damages, avoid the claim entirely, evaluate the matter and work out a compromise resolution, maintain records relevant to the costs that the contractor claims it is incurring, and maintain records to defend itself when, years later, the claim is adjudicated. MDOT will be able to do none of that if a contractor can first assert its claim – as in the instant case – months after the work has been completed. In the instant case, the contractor seeks nearly $737,955, a substantial sum of money. But multiplied many, many times as other contractors seek to take advantage of the Court of Appeals' unprecedented decision, the cost to the public treasury could be very great. There is a clear public interest in state agencies being allowed to enforce fair contractual provisions designed to protect the public from false or inflated claims.

Second, and for the foregoing reasons, the issue in this appeal involves a legal principle of major significance to the state's jurisprudence – whether state agencies have the authority to enforce contractual provisions that require contractors for public projects to give the agencies written notice of their intent to file claims, before all the damages are incurred, all the evidence destroyed, and the opportunity for defensive measures has evaporated.

Third, the decision of the Court of Appeals is clearly erroneous and will cause material injustice for the reasons set forth above.

MDOT asks that this Court grant its Application for Leave to Appeal, or alternatively, pursuant to MCR 7.302(F)(1), in lieu of granting Leave to Appeal, issue a peremptory order reversing the Court of Appeals' opinion, thereby affirming the Court of Claims' decision.

INTRODUCTION

This case concerns the enforceability of a contract clause that MDOT has used for several decades to manage its $1 billion highway contracting program – the requirement that the contractor give timely written notice if it intends to file a claim for extra compensation.

The contract requires that the notice be given before the work is performed, to give MDOT an opportunity to assess the actual conditions on the job site, avoid or mitigate any additional costs, if possible, and document the actual additional costs incurred. If MDOT believes it is not liable for the additional costs, it can gather and document the relevant evidence to defend itself when – perhaps years later – the claim is adjudicated. The contract provides that if written notice is not timely given, the claim is barred, with one exception. If it can be shown that (1) the extra costs were unforeseeable and (2) the claim is substantiated by MDOT records, the claim may be allowed. MDOT has used and enforced this clause for many years. Summary disposition for failing to comply with it has been upheld in an unpublished opinion of the Michigan Court of Appeals, and similar clauses have been upheld by the appellate courts of several other states.

Boddy admitted that it did not give MDOT the required notice. Indeed, Boddy first gave MDOT written notice of its intent to file a claim for additional compensation several months after the work had been performed – at a time when it was no longer possible for MDOT to take the steps described above. With regard to the amount of the additional compensation claimed, not even Boddy kept any records or documentation, relying instead on the memory of Horace Boddy, whose memory was subsequently lost (see, *infra,* at page 28). Enforcing the contractual mandate, the Court of Claims granted summary disposition for MDOT.

The Court of Appeals reversed the Court of Claims decision, refusing to enforce the notice clause. Although no record evidence was cited to support the decision, the Court of

Appeals ruled that MDOT waived the notice provision by agreeing not to enforce it. (The record contains no such agreement.) Citing certain handwritten notes allegedly made by Mr. Boddy while he could still recall some of the claimed damages, as substantiation its damages, the Court of Appeals remanded the case to give Boddy an opportunity to prove its claim for additional compensation. (Boddy failed to produce even the handwritten notes during discovery.)

This appeal seeks reversal of the Court of Appeals decision so that MDOT can enforce the clear terms of the contract and bar the claim for $737,955 in claimed additional compensation. Even more importantly, this appeal seeks reversal of the Court of Appeals decision so that it is not relied upon in future similar cases. While the opinion is unpublished and therefore not binding precedent, unpublished opinions are commonly cited and relied upon by trial courts as persuasive on points of law. The opinion has already been cited in an effort to persuade another panel of the Court of Appeals to reverse summary disposition that was granted for MDOT, based on the failure of a contractor to give MDOT timely written notice of claims. (See Appellant's Reply Brief in *Walter Toebe Construction Company v MDOT*, Court of Appeals No 244356.)

This Application will explain the critical importance of enforcing the requirement and demonstrate that the decision by the Court of Appeals was clearly erroneous. Moreover, the Court of Appeals failed to follow recent decisions of this Court in regard to the grant or denial of motions for summary disposition under MCR 2.116(C)(10).

STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

In 1995, MDOT awarded a contract to Boddy for the reconstruction and widening of 2.2 miles of I-94 Business Loop in the City of Marysville, St. Clair County. The amount of the contract was approximately $6,000,000. As is customary for highway contracts, that amount was not known with certainty because the contract was a unit price contract in which bids are based on estimated quantities, but payment is based on actual quantities. Boddy completed the project in late 1996, and has been paid approximately $7,328,000.

After the project was completed, Boddy set forth 15 to 16 claims for additional compensation. MDOT reviewed the claims, agreed that its records substantiated some of the claims, and paid Boddy for those claims. It did not pay Boddy for six claims. (Ralph Langdon affidavit at paragraphs 8-10; Exhibit B to MDOT's Motion for Summary Disposition.) After Boddy exhausted its administrative remedies with regard to these remaining six claims, it filed a Complaint in the Court of Claims seeking approximately $737,955. After extensive discovery, MDOT brought a motion for summary disposition under MCR 2.116(C)(8) and (10) arguing that the express provisions of the contract prohibited payment of extra compensation unless the contractor notified the MDOT engineer, before beginning the alleged extra work, of the contractor's intention to file a claim.

The provision at issue was section 1.05.12 of the 1990 Standard Specifications for Construction, a part of the contract. (Boddy's Answers to MDOT's First Request for Admissions, No. 41.) In the event that a contractor believes it is entitled to extra compensation for work or material not clearly covered in the contract, section 1.05.12 provides a strict procedure for making a claim for its costs. The contractor must give MDOT timely written notice of its intent to file a claim, or the claim is barred. An exception is provided for circumstances where the claim is substantiated by MDOT records, and where the extra costs were not foreseeable.

It is undisputed that Boddy failed to provide timely written notice to MDOT of its intent to file the claims set forth in its Complaint. The first time Boddy ever provided notice to MDOT of its intent to file such claims was in a letter to MDOT dated April 16, 1997. (Exhibit 5 of MDOT's Additional Documentation in Support of Summary Disposition.) The work upon which these claims are based was begun in 1995 and 1996. (Exhibit 6 of MDOT's Additional Documentation in Support of Summary Disposition.) Additionally, MDOT records do not substantiate Boddy's claims. (Ralph Langdon Affidavit, Exhibit B of MDOT's Brief in Support of Motion for Summary Disposition.)

In response to MDOT's motion for summary disposition, Boddy argued that MDOT waived strict compliance with section 1.05.12 of the Standard Specifications. The Court of Claims disagreed and granted MDOT's motion. It found that Boddy understood that notice was required before additional compensation for work performed would be paid. It also found that Boddy did not give the required notice for the claims at issue. Additionally, the Court found no basis for a waiver of the notice provision. As to whether Boddy's claims were substantiated by MDOT records, the Court found that they were not. Moreover, the Court found that Boddy could not produce any of its own records to substantiate its claims. (See Exhibit 1.)

Boddy then appealed to the Court of Appeals. It again argued that MDOT waived the notice requirement in the contract. It also argued that MDOT's records substantiated Boddy's claims, but it failed to specifically identify or attach any such records. On February 28, 2003, after receiving MDOT's response and listening to oral argument, the Court of Appeals reversed the Court of Claims' decision and remanded the case for further proceedings. It found that MDOT agreed to waive strict compliance with the written notice requirement. It also stated, in regard to Boddy's ability to prove damages, that there was a genuine issue of material fact as to

whether it was entitled to additional compensation. (See Exhibit 2.) On April 18, 2003, the Court denied MDOT's motion for rehearing. (See Exhibit 3.)

ARGUMENT

I. The parties contractually agreed that a claim is barred unless MDOT is given timely written notice of the intent to file a claim. Boddy admitted that notice was not so given. Reversing the Court of Claims, the Court of Appeals ruled that MDOT "agreed" to waive the notice requirement. The ruling of the Court of Appeals was not supported by the record and was clearly erroneous.

A. Standard of Review.

The Court of Claims granted summary disposition in favor of MDOT under MCR 2.116(C)(10). Accordingly, this appeal presents questions of law for which appellate review is always *de novo*. *Straus v Governor,* 459 Mich 526, 533; 592 NW2d 53 (1999). *Spiek v Dep't of Transportation,* 456 Mich 331, 337; 572 NW2d 201 (1998) held:

> MCR 2.116(C)(10) tests the factual support of a plaintiff's claim. The court considers the affidavits, pleadings, depositions, admissions, and other documentary evidence submitted or filed in the action to determine whether a genuine issue of any material fact exists to warrant a trial.

In the instant case, MDOT's motion for summary disposition presented clear and unambiguous evidence to establish that Boddy's claim was barred by the contractual written notice provision. To avoid the granting of summary disposition in favor of MDOT, Boddy was required to submit substantively admissible evidence to establish a genuine issue of material fact. *See Quinto v Cross & Peters Co,* 451 Mich 358, 363; 547 NW2d 314 (1996). As this Court stated in *Maiden v Rozwood,* 461 Mich 109, 121; 597 NW2d 817 (1999):

> The reviewing court should evaluate a motion for summary disposition under MCR 2.116(C)(10) by considering the substantively admissible evidence actually proffered in opposition to the motion. A reviewing court may not employ a standard citing the mere possibility that the claim might be supported by evidence produced at trial.

B. Analysis.

1. Boddy's claims are barred for failing to give timely written notice.

Nearly all of MDOT's highway program is performed under contract with independent highway contractors. For more than fifty years, the legal structure of the relationship has been set forth in an edition of a paperbound book entitled "Standard Specifications for Construction." That book is made a part of the contract. Under the Standard Specifications, a contractor is required to provide the necessary equipment and personnel to complete the project properly and on time. Whether the contract is for a relatively simple bituminous overlay or a highly complex freeway interchange, MDOT generally provides the plans and specifications, but the contractor is in full control of the selection and management of equipment, personnel, methods of operation, and perhaps much more.

If the contractor fails to carefully review the plans or uses ill-suited equipment, inadequately trained personnel, or a poor project manager, problems can develop on the job site. If the contractor underbid the job and now seeks to recoup the "losses," or made errors of judgment on the job site that increased costs, problems may arise. Of course, problems can also arise because of some deficiency in MDOT's plans or the occurrence of some unforeseen obstacle to performance. For most problems that arise on the site, the contractor makes adjustments and completes the work. At the time the contractor may grouse about the problem to MDOT, verbally attributing fault to subcontactors, suppliers, bad luck, the weather, MDOT's plans and specifications, or some combination of factors. In a few cases, the contractor may make a claim for extra compensation. Until MDOT is actually given written notice of an intention to file a claim, it cannot know that the contractor has a serious intent to pursue a claim against MDOT.

Equally important to the requirement that written notice be given is the requirement that timely notice be given. If the contractor is going to ask MDOT to pay extra compensation, the intent to do so must be expressed at a time when MDOT can evaluate the problem and its cause, and assess alternative ways of addressing it. MDOT must be given the opportunity to mitigate or avoid the damages, or at least document the additional costs incurred. MDOT must be given the opportunity to gather evidence and documentation that will be needed to defend itself against the claim. If the notice is not timely – as in the instant case – it is impossible for MDOT to protect itself from unfounded or false claims. The clause is essential for MDOT to fulfill its responsibility to process claims having merit, while protecting the public treasury from illegitimate claims.

The language of the contract is clear – if the notice is not given, the claim is barred, unless it fits within the stated exception:

> **1.05.12 Disputed Claims for Extra Compensation**.--If any inconsistency, omission, or conflict is discovered in the contract or if in any place the meaning of the contract is obscure, or uncertain, or in dispute, the Engineer will decide as to the true intent.
>
> **a. Notice of Claim.**-- If the Contractor intends to seek extra compensation for any reason not specifically covered elsewhere in the contract, **the Contractor shall notify the Engineer in writing of the Contractor's intention to make claim for such extra compensation before beginning work on which the Contractor intends to base a claim** or the Contractor shall notify the Engineer within 24 hours after the commencement of the delay, suspension of work, loss of efficiency, loss of productivity or similar event on which the claim will be based. If the Contractor intends to file a claim based upon the denial of an extension of time request for any reason not specifically covered elsewhere in the contract, the Contractor shall notify the Engineer in writing within 7 days after the Department mails to the Contractor the denial of the Contractor's request for such extension of time. Neither the refusal of the Contractor to sign a written recommendation or work order nor the Contractor's signing a recommendation or work order under protest shall constitute the notice required herein. **Failure of the Contractor to give such notification or to afford the Engineer proper facilities for keeping strict account of actual cost of the work or delay upon which the notice of intent to file claim was made will constitute a waiver of the claim for such**

> **extra compensation** or extension of contract time **unless such claims are substantiated by Department records and the extra costs were unforeseeable.** [Emphasis added.]

Boddy has not disputed that the foregoing is a provision of the controlling contract.

As noted by the Court of Appeals, it is an undisputed fact that Boddy did not give the required notice:

> It is undisputed that plaintiff failed to provide the MDOT engineer in question with written notice of its intent to file a claim before beginning the work upon which plaintiff's claim is based.
> [Page 2 of Exhibit 2.]

In response to MDOT's First Request for Admissions, numbers one through sixteen, Boddy admitted that it failed to provide MDOT with written notice of its intent to file a claim before it began the work on which its claims are based. It also failed to afford MDOT's Engineer proper facilities for keeping strict account of actual cost of its work. (Ralph Langdon affidavit at paragraph 14; Exhibit B to MDOT's Brief in Support of Motion for Summary Disposition.) MDOT was thus unable to either verify or keep actual cost of Boddy's alleged damages.

The undisputed facts of record further show that Boddy's claims do not fall within the above quoted exception for claims that are: (1) substantiated by MDOT records, and (2) for extra costs that were unforeseeable.

Ralph Langdon was MDOT's resident engineer during the project. He filed an affidavit in support of MDOT's motion for summary disposition attesting that Department records do not substantiate any of Boddy's claims, "Department records do NOT substantiate Plaintiff's claims set forth in this lawsuit." (Ralph Langdon affidavit at paragraph 15; Exhibit B to MDOT's Brief in Support of Motion for Summary Disposition.) Boddy did not file any contradictory evidence. Moreover, during the course of discovery MDOT attempted to elicit from Boddy whether it had any evidence to show that its claims are substantiated by Department records. (MDOT's Request

for Admissions Nos. 25-32) Boddy responded that it did not know if there were any such records. MDOT's First Set of Interrogatories and Request for Production of Documents numbers 25 to 32 also asked Boddy to produce all Department records that substantiate Boddy's claims. Despite the duty to supplement its answers if new information became available, Boddy never produced any such documentation, even after the completion of discovery. The exception to the requirement to give timely written notice simply does not apply to this case.

This Court has held that the parties are bound by the clear and unambiguous terms of their contracts. It is fundamental that the terms of a contract must be enforced as written where there is no ambiguity. *Henderson v State Farm Fire and Casualty Co,* 460 Mich 348, 354; 596 NW2d 190 (1999). A contract is a matter of agreement by the parties; the courts will determine what that agreement is and enforce it accordingly. *Eghotz v Creech,* 365 Mich 527, 530; 113 NW2d 815 (1962). In *Schneider v City of Ann Arbor,* 195 Mich 599, 610; 162 NW 110 (1917), this Court concluded with regard to a contractor's claim for additional compensation for extra work "that the parties were bound by the terms of this contract, and that plaintiff could not recover for extra work and material, except pursuant to its terms and in the manner therein provided."

MDOT's contractual notice requirement has been upheld in the past. In the unpublished Court of Appeals decision in *Lanzo Construction Co v Michigan Dep't of Transportation* (No 181944, September 27, 1996), the Court applied section 1.05.12 of the 1984 Standard Specifications, concluding:

> Plaintiff failed to sustain its burden of showing a genuine issue of material fact regarding whether it gave written notice as required under § 1.05.12. *Skinner v Square D Co*, 445 Mich 153, 160; 516 NW2d 475 (1994). **Because that section requires written notice to preserve a claim for extra compensation, the trial court properly granted summary disposition for defendant**. [Emphasis added; Slip Opinion, page 3.]

A copy of that unpublished opinion is attached as Exhibit 4. That ruling is in accord with generally accepted principles of contract law.

In *Byron's Construction Co v North Dakota State Highway Department*, 448 NW2d 630 (ND 1989), the North Dakota Supreme Court interpreted a nearly identical provision[1] from North Dakota's Standard Specifications for Road and Bridge Construction. In upholding the dismissal of the contractor's claims for failing to timely give the requisite written notice of its claims, the court observed:

> The notice requirement protects important concerns of the state by permitting early investigation of the validity of a claim when evidence is still available by allowing the Highway Department to compile records of the contractor's costs, and by allowing the Highway Department to consider alternate methods of construction to prevent unnecessary expenditures. [*Id.*, at 633.]

Another nearly identical notice provision[2] was involved in *State v Omega Painting, Inc*, 463 NE2d 287, 294 (Ind App, 1st Dist, 1984). The Indiana Appellate Court stated, "That section

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[1] Section 24-02-26.1, N.D.C.C., provides in relevant part:

> "Full compliance by a contractor with the provisions of this section is a condition precedent to the contractor's right to demand arbitration. If the contractor believes the contractor is entitled to additional compensation for work or materials not covered in the contract or not ordered by the engineer as extra work or force account work in accordance with the contract specifications, the contractor shall, prior to beginning the work which the claim will be based upon, notify the engineer in writing of the intent to make claim for additional compensation. If the basis for the claim does not become apparent until the contractor has commenced work on the project and it is not feasible to stop the work, the contractor shall immediately notify the engineer that the work is continuing and that written notification of the intent to make claim will be submitted within ten calendar days. Failure of the contractor to give the notification required and to afford the engineer facilities and assistance in keeping strict account of actual costs will constitute a waiver of claim for additional compensation in connection with the work already performed." [Emphasis added; *Byron's Construction Co* at 633.]

[2] The Indiana State Highway Standard Specifications for 1978 are made part of that contract through the proposal. The specifications state, in pertinent part:

is clear and unambiguous. Absent the requisite written notification, the contractor is without recourse."

In *Rea Construction Co v State Roads Commission of Maryland,* 226 Md 569, 574; 174 A2d 577 (1961) the Court of Appeals of Maryland upheld a similar clause[3], noting however, that it is possible to waive the notice requirement:

> The courts are in general accord that a provision in a contract similar to that under consideration is valid, and, in the absence of conduct operating as a waiver or raising an estoppel hold that failure to give notice of an intention to claim extra compensation in the manner and at the time specified precludes recovery therefor. See *Enochs v. Christie*, 291 P. 2d 200 (Cal. 1955). See also *Commercial Inv. Co. v. Herman*, 131 Atl. 223 (N. J. Chancery 1925). Cf. *Eastover Stores, Inc. v. Minnix*, 219 Md. 658, 150 A. 2d 884 (1959).

Accord, Rutherford v Kahler, 174 Ark 894, 896; 298 SW 9 (1927). The *Rea* ruling is in accord with the ruling of this Court in *Strom-Johnson Construction Co v Riverview Furniture Store,* 227 Mich 55; 198 NW 714 (1924), where this Court considered the enforceability of a contract clause

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> "If the Contractor deems that additional compensation will be due him for work or material not clearly covered in the contract or not ordered as extra work, as defined herein, he shall notify the Engineer *in writing* of his intention to make claim for such additional compensation before he begins the work on which he bases the claim. *If such notification is not given* and the Engineer is not afforded proper facilities for keeping strict account of actual cost as required, *the Contractor shall make no claim for such additional compensation.* [Emphasis supplied.]" [*Omega Painting, Inc* at 294.]

[3] The Court noted that:

> The pertinent part of that section provides:
> "[W]here the contractor deems extra compensation is due him for work or materials not clearly covered in the contract, or not ordered by the Engineer as an extra, * * * the Contractor *shall notify the Engineer in writing of his intention to make claim* for such extra compensation before he begins the work on which he bases the claim. *If such notification is not given*, or the Engineer is not afforded proper facilities by the Contractor for keeping strict account of actual cost, *then the Contractor hereby agrees to waive the claim for such extra compensation.* [Emphasis added.]" [*Rea Construction Co* at 573-574.]

barring any extension of time unless a written request therefore were made within seven days after the delay occurred. The clause was held to be enforceable, if not waived:

> The provisions in [the written agreement] relative to delays, extensions of time, written notice, etc., were binding and plaintiff was bound to observe them at its peril in the absence of any subsequent understanding or agreement between the parties, express or implied, or waiver of them by conduct on the part of defendant. [*Id.*, at 67.]

But such waiver should be unequivocal. In *Port Huron Education Ass'n v Port Huron Area School District,* 452 Mich 309, 329; 550 NW2d 228 (1996), this Court held, concerning a claim, that past practice modified a clear term of a labor agreement, "'The highest quantum of proof will ordinarily be required in order to show that the parties intended by their conduct to amend or modify clear and unambiguous contractual language, . . .'" The Court added:

> 'While, to be sure, parties to a contract may modify it by a later agreement, the existence of which is to be deduced from their course of conduct, the conduct relied upon to show such modification must be unequivocal and the terms of modification must be definite, certain, and intentional.' [Emphasis added; *Id.*]

That same principle should be applied to the State's highway construction contracts. MDOT is engaged in hundreds of highway projects every year, presenting a management task of enormous difficulty. Yet, it has a public duty to assure that it expends funds wisely, utilizing procedures that are both fair and prudent for the administration of contracts. The notice provision is intended to serve those ends. It is a provision of longstanding; the highway contracting industry is familiar with the requirements, and contractors can easily fulfill them. No waiver should be found in the absence of a clear and intentional relinquishment of the contract right by a person having the authority to do so.

In *Lather v School District No 1,* 243 Mich 90, 95-96; 219 NW 700 (1928), this Court cited *Strom-Johnson* in regard to the plaintiff's contention that the school district had waived

compliance with the terms of a construction contract, beyond certain extras that were agreed upon, stating:

> We find no consent or acquiescence on the part of the officers which would relieve the plaintiffs from their undertaking to construct this building for the amount fixed in the contract, with an allowance added thereto for the extras agreed upon, and no intentional relinquishment of their right to insist upon performance according to the terms of the contract as so modified. [Emphasis added.]

Similarly, in *Couper v Metropolitan Life Ins Co,* 250 Mich 540, 544; 230 NW 929 (1930), this Court stated, "'A waiver is the intentional relinquishment of a known right.'" (Emphasis added.) Before Boddy began the project, it agreed to "complete the work in . . . strict conformity with the requirements of the 1990 Standard Specifications for Highway Construction, . . ." (See the front page of the Proposal, which is part of the Contract, at Exhibit 1 of MDOT's Additional Documentation in Support of Summary Disposition.) MDOT asks no more than that Boddy honor its agreement, absent a clear and intentional waiver by MDOT.

The ramifications of employing a low standard of proof to establish a waiver is apparent in the instant case. Here, claims were first presented many months after the work was performed. If contractors can avoid the terms of the contract by simply alleging that some unidentified person made some unspecified statement, implying that the notice requirement might not be strictly enforced, MDOT will have no reasonable ability to guard against false and inflated claims. MDOT would be given no opportunity to examine the conditions, take measures to avoid the additional costs, document the circumstances so that it could calculate any actual damages, or defend itself against any subsequent claims.

The public demands that state agencies exercise great care in their management of public funds. That can only be accomplished if contractors are held accountable for the plain and fair contractual language upon which their bids for public contracts are based.

Nonetheless, the Court of Appeals found that MDOT waived the notice requirement by agreement.

2. MDOT did not agree to waive the requirement for timely written notice.

The Court of Appeals ruled:

> Nevertheless, we agree with plaintiff's contention that defendant waived strict compliance with § 1.05.12. See *Jacob v Cummings*, 213 Mich 373; 182 NW 115 (1921). Here, the record indicates that **defendant waived strict compliance with the written notice requirement by agreeing with plaintiff to resolve disputes arising with the plans and specifications of the project without the need of filing a written notice of intent to file a claim.** Thus, the trial court erred, as a matter of law, in ruling that defendant did not waive strict compliance with § 1.05.12(a) of the 1990 Standard Specifications for Construction. [Emphasis added; page 2 of Exhibit 2.]

The Court did not identify the evidentiary support in the record for that finding of an agreement; in fact, there is no such support.

In its Brief on Appeal to the Court of Appeals, Boddy asserted that:

> At the very beginning of this project, MDOT and Boddy adopted and agreed to procedures for resolving conflicts that may arise during the project. . . The Partnering Project Charter (Charter) adopted by MDOT and Boddy called for weekly or bi-weekly progress meetings. . . The Charter provided an alternative means of resolving disputes such as requests for extra compensation which did not strictly follow the procedure found in Section 1.05.12(a) of the 1990 Specs. [Boddy's Brief on Appeal at page 5.]

No evidence was submitted to support those allegations. It is an indisputable matter of fact that no such Charter was ever placed into evidence before the Court of Claims. Indeed, Boddy did not quote any language from the Charter or even make the legal argument in the Court of Claims[4]. The record contains no substantively admissible evidence regarding the terms of any such Charter.

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[4] Since the argument regarding the Charter was not raised in the Court of Claims, Boddy failed to preserve it for appeal. An issue raised for the first time on appeal is not preserved for appellate review. *FMB-First Mich Bank v Bailey*, 232 Mich App 711, 718; 591 NW2d 676

To the extent that the Court of Appeals reversed the decision of the Court of Claims in reliance on mere allegations concerning the content of the Charter, its decision was clearly erroneous and violative of this Court's decisions in *Quinto, supra,* and *Maiden, supra.*

Moreover, MDOT negated any possibility of the Charter waiving the contractual notice requirement. The Special Provision for Partnering, which is part of the contract, provides, "The establishment of the team building program will not change the legal relationship of the parties to the contract nor relieve either party from any terms of the contract." (Emphasis added; Exhibit 3 to MDOT's Brief on Appeal.)

In addition to offering no evidence that MDOT agreed to waive the written notice requirement, Boddy admitted that no MDOT representative ever said that Boddy need not comply with it. John Zimmer was Boddy's Project Manager for this contract. Mr. Zimmer had daily contact with MDOT. (Zimmer transcript at page 15; Exhibit 11 of MDOT's Additional Documentation in Support of Summary Disposition.) According to Mr. Zimmer, at no point during the project, did anyone from MDOT state that Boddy was not required to file a written notice of intent to file a claim:

> Q. Mr. Zimmer, did you have any conversations with anybody from MDOT regarding the necessity of filing a written Notice of Claim?
>
> A. I may have late in the game, towards the end of the project. I can't say that I definitely recall.

(1998); *Auto Club Ins Ass'n v Lozanis*, 215 Mich App 415, 421; 546 NW2d 648 (1996). The issue regarding the Charter is not an issue of law for which all facts necessary for its resolution were presented. When a cause of action is presented for appellate review, a party is bound to the theory on which the cause was prosecuted or defended in the court below. *Gross v General Motors Corp*, 448 Mich 147, 161-162, n 8; 528 NW2d 707 (1995). The Court of Appeals below was bound to follow those rulings. A published opinion of the Court of Appeals is binding on other panels. MCR 7.215(I)(1). *Straman v Lewis*, 220 Mich App 448, 451; 559 NW2d 405 (1996).

Q. Would that conversation, if one did occur, would that have occurred after the work was finished?

A. Oh, yes.

Q. **Did you ever overhear anyone from MDOT make any statements regarding the requirement of filing a written Notice?**

A. **Though [sic], I don't think so.**

* * *

Q. **I take it from your prior answer then, that you have never heard anybody from MDOT say that written Notice of an intent to file a claim was not required on this job; is that correct?**

A. **I never heard -- they never told me that it wasn't required, that would be correct, they have never told me that.**

[Emphasis added; Zimmer transcript at pages 61-62; Exhibit 11 of MDOT's Additional Documentation in Support of Summary Disposition.]

Horace Boddy, who was the president of Boddy, also testified, in regard to comments made by various MDOT personnel, that no one told him that he need not comply with the notice requirement – though his testimony was somewhat equivocal and internally contradictory:

Q. And the tape recordings[5] that you kept of these meetings, it would have included these conversations you have just described for me where Gene Coglin, Bob Tiera, Noel Smith and Jim Hansen state that a Notice of Claim is not required?

A. **I don't think they came out and said a Notice of Claim was not required**, I think they came out and said no notice has to be given and we are going to keep up to you, we are going to keep track of the time and pay you in some way, or in some kind of language like that. I don't think a Notice of Claim as you are saying it ever was really -- came out and say you don't have to file a Notice of Claim, they have always beat around the bush with it.

Q. **Did you ask them to clarify it?**

---

[5] Mr. Boddy testified, at page 76 of that deposition, that, as far as he knew, those tape recordings that he made of meetings with MDOT personnel were no longer around.

A. **No, I did not.**

[Emphasis added; Horace Boddy transcript at page 75; Exhibit 12 of MDOT's Additional Documentation in Support of Summary Disposition.]

Certainly, that falls far short of evidence that MDOT manifested a clear intent not to enforce the timely written notice requirement.

Boddy identified nothing else in the evidentiary record to show that MDOT agreed to waive the notice requirement. The finding of the Court of Appeals that MDOT agreed to waive the timely written notice requirement was unsupported by the record and clearly erroneous.

3. No other acts by MDOT personnel effected a waiver of the notice requirement.

Boddy quoted two excerpts from the deposition testimony of Ralph Langdon to support its claim that the notice requirement was waived. (Boddy's Brief on Appeal, page 6.) The first excerpt describes how a contractor who "feels he's got additional work or has done additional work or has a problem with the plans or specifications" will discuss the matter with MDOT. It goes on to state that if an agreement cannot be reached, "that's when it becomes a claim." By indicating a willingness to try to resolve disputes before they turn into claims, the testimony is in no way inconsistent with the requirement to give written notice to preserve a claim. No doubt countless potential problems are worked out on a construction site before they become claims. In no sense could that pre-claim activity represent a waiver.

Boddy then quoted more of Mr. Langdon's deposition testimony and argued that the testimony revealed "MDOT's waiver of strict compliance with the written notice provision." The testimony was:

Q. **With regard to the eight or ten claims that the contract[or] either abandoned or you were able to work out and compromise**, do you know if those claims procedures were strictly adhered to?

A. Maybe not strictly adhered to. They were possibly adhered to loosely. Most of the time on extra work if the contractor encountered something on a project that we didn't anticipate he's not gonna stop work. He's gonna keep working and accept—expect to get extra payment for. Now, normally— [Emphasis added; Boddy's Brief on Appeal, page 6.]

As explained in the Statement of Material Proceedings and Facts, Boddy set forth 15 to 16 claims for additional compensation after the project was completed. MDOT reviewed the claims, agreed that its records substantiated some of the claims and paid Boddy for those claims. It did not pay Boddy for six claims; those claims are the subject of this litigation. The other claims were either abandoned by Boddy or paid by MDOT. (Langdon affidavit at paragraphs 8-9; Exhibit B to MDOT's Motion for Summary Disposition.) These other claims are what the above deposition testimony refers to. Counsel for Boddy asked Mr. Langdon if MDOT strictly adhered to the claims procedures in analyzing those claims that never made it into this litigation. Mr. Boddy said that they were loosely, rather than strictly, adhered to.

Mr. Langdon's answer makes sense when one remembers the language of section 1.05.12. It allows the contractor to pursue a claim for which written advance notice was not given, if two conditions are met: "such claims are substantiated by Department records and the extra costs were unforeseeable." Here, Boddy did not provide notice with regard to any of the 15-16 claims. But MDOT worked with Boddy to reduce the number of claims that would result in litigation. Mr. Langdon was hired back by MDOT after his retirement to specifically review and analyze Boddy's claims. (Langdon affidavit at paragraph 7; Exhibit B to MDOT's Motion for Summary Disposition.) For the claims that MDOT paid, Mr. Langdon found MDOT records that substantiated those claims. He also determined that the extra costs were unforeseeable. (Langdon affidavit at paragraph 10; Exhibit B to MDOT's Motion for Summary Disposition.) Thus, Boddy did not strictly adhere to section 1.05.12 because it did not give MDOT advance

written notice of its claims, but MDOT adhered to the language of the entire section by waiving the notice requirement for those claims that fell within the exception to the notice requirement.

4. If the evidence of waiver had been in dispute, remand was required.

For the reasons set out above, MDOT contends that there was no substantively admissible evidence offered to establish a genuine dispute of fact as to whether MDOT waived compliance with the notice requirement. But under even the most extreme interpretation of the record, it could not be found that the undisputed evidence established that MDOT had waived compliance. At the very most, the record would present an issue of disputed fact.

Neither the trial court nor the Court of Appeals may resolve a disputed fact in the context of a motion for summary disposition. MCR 2.116(C)(10); *Maiden v Rozwood, supra*, at 120. "Under MCR 2.116(C)(10), summary disposition is appropriate only where there is no genuine issue of material fact." *Vargo v Sauer,* 457 Mich 49, 70-71; 576 NW2d 656 (1998). It is the function of the factfinder alone to listen to testimony, weigh the evidence, and decide the questions of fact. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992). "The court is not permitted to assess credibility, or to determine facts on a motion for summary judgment." *Skinner v Square D Co, supra*, at 161.

If the record were found to contain disputed evidence on the issue of waiver, the Court of Appeals could go no further than to reverse the ruling of the Court of Claims and remand the case for further proceedings. *See Vargo, supra*, at 71-72. It was clear error for the Court of Appeals to make its own factual finding, in the face of MDOT's evidence that it did not waive compliance:

> Here, the record indicates that defendant waived strict compliance with the written notice requirement by agreeing with plaintiff to resolve disputes arising with the plans and specifications of the project without the need of filing a written notice of intent to file a claim. Thus, the trial court erred, as a matter of law, in

> ruling that defendant did not waive strict compliance with § 1.05.12(a) of the 1990 Standard Specifications for Construction. [Page 2 of Exhibit 2.]

With that ruling, the issue of waiver would be taken out of the hands of the Court of Claims on remand. As this Court ruled in *Fothergill v McKay Press,* 361 Mich 666, 676; 106 NW2d 215 (1960), "Waiver, of course, is a matter of intent, and will be so determined by the trier of the facts . . . ." Similarly, this Court in *Strom-Johnson, supra,* at page 67 stated that waiver, "is primarily an issue of fact." Were this Court to find that Boddy submitted sufficient substantively admissible evidence to establish a genuine issue of material fact on the question of waiver, this case would have to be remanded to the Court of Claims for further proceedings on the issue.

II. The Court of Appeals ruled that there exists a genuine issue of material fact as to whether Boddy is entitled to additional compensation for its highway construction. The record, however, shows there to have been a lack of substantively admissible evidence to create a genuine issue of material fact.

A. Standard of Review.

Upon the authorities cited for the standard of review for Argument I, a decision granting or denying summary disposition under MCR 2.116(C)(10) is reviewed *de novo. Spiek v Dep't of Transportation, supra.*

B. Analysis.

The Court of Appeals ruled:

> Further, there was a genuine issue of material fact whether plaintiff was entitled to additional compensation for its highway reconstruction work. Specifically, although defendant maintains that plaintiff has failed to attach any records substantiating its alleged claims, we note that Horace Boddy, in his deposition testimony, indicated that there were handwritten notations documenting the cost for excavating and disposing of temporary aggregate off site in the amount of $91,407.37. On remand, the trial court is thus instructed to determine whether plaintiff was entitled to additional compensation and in what amount. [Page 2 of Exhibit 2.]

Boddy offered no substantively admissible evidence to establish that it could prove a claim for damages. That proposition is established from the deposition testimony from Mr. Boddy (which also shows that the handwritten notation of $91,407.37 may no longer exist and was never based on documented costs).

In fact, Boddy's alleged damages are based solely on Mr. Boddy's "calculations" from his memory of the project. The following excerpts from Mr. Boddy's deposition clearly justify the Court of Claims' conclusion that "Plaintiff cannot provide any records that they kept to substantiate the amount of the additional compensation. Testimony of Horace Boddy that he kept all of it 'in his head' is incomprehensible." (Page 8 of Exhibit 1.) The testimony of Mr. Boddy also clearly refutes the unsupported arguments on pages 7 to 11 of Boddy's Brief on Appeal wherein it claims that MDOT records (despite its failure to supply, or even reference, any such records) support each of the six claims set forth in its complaint:

Q. **Do you have any documentation to support the amount that you asked for in the complaint?**

A. **No, I don't. I have it pretty well in my head** and I did that by how many nights -- or roughly how many nights went out there and. Everything, **but then since the Complaint has been written I kind of let that slip out of my mind.**

* * *

Q. In calculating this amount for cost to remove and replace temporary aggregate, how did you come up with the $112,880.16?

* * *

Q. **Do you have any documentation to support this figure?**

A. **No, I don't, just the back of my head.** I lived on this job.

* * *

Q. Is this $112,880.16 figure that you have calculated based on square yards or load tickets?

* * *

Q. And again, there is no documents to support that number, right?

A. No.

Q. Is that correct?

A. That's correct.

* * *

Q. The next amount in the Complaint, paragraph 11, is a request for additional compensation for the cost to excavate and dispose of temporary aggregate off site in the amount of $91,407.37. How did you calculate that number?

* * *

Q. Is that figure $91,407.37 supported by any documentation?

A. I don't know if it is still around, Dave, or not.

Q. The documentation that -- that you are not sure whether it is around or not, what would that be?

A. Just a yellow pad.

Q. Your handwritten notations?

A. Handwritten notations.

* * *

Q. And in calculating this $91,000, did you subtract the cost that you would have incurred to truck additional material on site for the fill and other material?

A. We took that into consideration.

Q. How much did you subtract off?

A. I couldn't tell you that figure today.

Q. Do you have anything that would tell me that?

A. No.

* * *

Q. Other than being in your mind, is there any documentation to support the $338,682 claim for geotextile separator?

A. If I can set down with a piece of paper I can calculate it right out for you

Q. Without you drafting a new piece of paper, a new document, is there anything right now that will substantiate that amount?

A. I don't believe so.

* * *

Q. **How many days did Boddy work on this site installing fabric, that you are asking for additional compensation on?**

A. **Boddy probably worked close to 60 days behind the curb.**

Q. **Is that supported by anything?**

A. **No, just in my mind.**

* * *

Q. I am showing you Deposition Exhibit Number 7. Is this your calculation for the increased cost for traffic control services?

A. One is a bill which was sent to us and we copied down off the bill. The other is a calculation and how we arrived at that.

* * *

Q. Is the figure of two hours each trip times 46 trips listed on E-4 -- page E-4 on Exhibit 7, is that based on any documentation?

A. That's just based on what we did and not filling out any documentation.

* * *

Q. This two-hour figure, is that based solely on documentation or is that based on what you believe it took to do?

A. No documentation, ...

* * *

Q. And 46 trips, the number 46, is that based on any documentation?

A. Nope, ...

* * *

Q. I am showing you, Mr. Boddy, what has been marked as Deposition Exhibit Number 8. This is your calculation for the additional excavation of fine grade for additional bituminous approaches installed?

A. $87,360, that is my calculation.

Q. Okay. The actual figures listed on pages F-2, F-3 and F-4 of Exhibit 8, other than the hourly rate for laborers and equipment, are these figures based solely on your memory.

A. A lot on my memory and a lot where it went . . . . You know, it is based on memory like that.

* * *

Q. No documentation?

A. No documentation.

Q. For any of the figures in Exhibit 8?

A. Any of the hours.

Q. I am showing you what has been marked as Deposition Exhibit 9. Is this your calculation for additional excavation and fine grade for additional sidewalk and curb and gutter installation?

A. Yes, it is.

Q. Are any of the figures in Exhibit 9, other than the hourly rate or fore -- for laborers or equipment, are any of the figures based on documentation?

A. No, none are based on documentation,

* * *

Q. What about on G-3 of Exhibit 9 here, you calculated these figures based on a nine-hour day, where did you come up with the nine hours?

* * *

Q. **Is there anything to verify other than your memory that laborers and pieces of equipment worked nine hours each day on excavating and fine grading additional sidewalk, curb and gutter?**

A. **No.**

[Emphasis added; Horace Boddy transcript at pages 53-54, 91-94, 98-99, 101, 105-106, 123, 126-130; Exhibit 12 of MDOT's Additional Documentation in Support of Summary Disposition.]

Horace Boddy's testimony illustrates the incomprehensibility of Boddy's alleged damages and the complete lack of any supporting documentation for its claims. Other than Mr. Boddy's inadmissible conjecture, there could be no evidentiary basis to prove Boddy's claims.

The testimony of John Zimmer is further evidence that Boddy's claims are without merit. His testimony proves that: (1) Boddy did not keep any records for any of the claims involved in this lawsuit; (2) yet, Mr. Zimmer kept records on behalf of Boddy for every issue that involved any disagreement between MDOT and Boddy; (3) on every issue that MDOT and Boddy actually disagreed on, both parties kept records; and (4) both parties regularly reviewed and compared the records that were kept for accuracy. The following excerpts of Mr. Zimmer's deposition testimony undeniably confirms that neither MDOT, nor Boddy, have any records that substantiate the claims set forth in Boddy's complaint:

THE WITNESS:

When an issue would come up, it may or may not involve additional work or additional costs. If there is any question at all that we couldn't resolve it immediately, I would keep notes or records of some sort. I may note it in this Franklin planner or, if it involved actual

time and hours, I kept a force account record. Whether we used it or not as a force account, I would keep a force account record. And then there may or may not be a need to go back to it, it may be resolved and it may not be. And then the issues that were not resolved towards the end of a job, I would -- I don't know if I want to call it a claim, I guess it was, it was more of a request, and I would just follow up on all of my records and note it.

* * *

Q. Okay. **Do you know if MDOT kept any force account records on this job?**

A. **Oh, I am sure, yeah.**

Q. **Did you ever review any of MDOT's force accounts records on this job?**

A. **All the time.**

Q. Okay. You would -- would you compare Boddy's records with MDOT's force account records?

A. I mean, if I recall correctly, the force account was my records, it would have to jive with their IDR's, they would put the force account information, they may note on their IDR that I am working Boddy's crew a force account, they have this man here and this equipment here, well, then I am also keeping tract. I would actually initiated the force account.

Q. Sure. **And then you would compare Boddy's records with MDOT's records?**

A. **We both would, yes.**

Q. **On any particular issue that was involved, right?**

A. **Yeah, pretty much**, I don't know that we did it a hundred percent of the time, maybe 98 percent, I don't really know, one or the other of us would compare, of course.

Q. To make --

A. If we didn't agree, why there would be an issue.

Q. Right. **And those records were kept both by Boddy and by MDOT when both parties knew there was a disagreement on a particular issue?**

A. **I think so.**

Q. **Otherwise there would be no need to keep the records, right?**

A. **Uh-huh.**

Q. **Correct? Uh-huhs are hard to come out on the record.**

A. **Yes**, I am sorry because I am thinking, too. If we were paid for a force account item, you know, there was no disagreement, we were just paid. I don't remember where the force account records would go, I would assume they had a copy and I had a copy and it went back to our office, yes. I would assume we both have copies of that.

Q. **My question is, those types of records wouldn't have been kept unless both parties knew there was a disagreement, correct?**

A. **Correct.**

Q. **And likewise, you would compare Boddy's records with somebody from MDOT and MDOT's records to make sure that both parties knew what -- where each side was coming from?**

A. **Yes.**

[Emphasis added; John Zimmer transcript at pages 21, 58-60; Exhibit 11 of MDOT's Additional Documentation in Support of Summary Disposition.]

As Mr. Zimmer indicated, "If there is any question at all that we couldn't resolve . . . immediately, I would keep notes or records of some sort." He was Boddy's Project Manager, in daily communication with MDOT. The fact that no documentation was ever made for the claims asserted in this lawsuit can only mean that no basis for the claims actually arose. These claims were concocted after the work was completed, when it was impossible for MDOT to investigate

the actual site conditions. The only substantiation that Boddy offered for its claims was the now forgotten memories of Mr. Boddy, as to which Mr. Boddy testified:

> Q. **Do you have any documentation to support the amount that you asked for in the complaint?**
>
> A. **No, I don't. I have it pretty well in my head** and I did that by how many nights -- or roughly how many nights went out there and. Everything, **but then since the Complaint has been written I kind of let that slip out of my mind.**
>
> [Emphasis added; Horace Boddy transcript at pages 53-54; Exhibit 12 of MDOT's Additional Documentation in Support of Summary Disposition.]

On its face, the evidence offered to support Boddy's claim could not provide a basis upon which an award of damages could be rendered.

RELIEF

MDOT asks that this Court grant its Application for Leave to Appeal, or alternatively, pursuant to MCR 7.302(F)(1), in lieu of granting Leave to Appeal, issue a peremptory order reversing the Court of Appeals' opinion, thereby affirming the Court of Claims' decision.

Respectfully submitted,

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Dated: May 9, 2003

STATE OF MICHIGAN

IN THE COURT OF CLAIMS

BODDY CONSTRUCTION COMPANY INC.,

Plaintiff,

v

STATE OF MICHIGAN, MICHIGAN, DEPARTMENT OF TRANSPORTATION,

Defendant.

OPINION AND ORDER

Hon. Peter D. Houk

Docket No.: 00-17592-CM

This matter is before the Court on Defendant Michigan Department of Transportation's (MDOT) Motion for Summary Disposition, pursuant to MCR 2.116(C)(8) and (10). Oral argument was heard on May 9, 2001. The Court has reviewed all briefs and exhibits. Plaintiff is seeking $724,954.66 in additional compensation. Defendant argues that the express provisions of the contract prohibit payment of extra compensation unless the contractor notifies the MDOT engineer of the contractor's intention and gives the engineer every opportunity to respond, which did not happen here. Plaintiff argues that, in this case, the contract provision is not applicable under the doctrine of waiver.

OPINION

FACTS

On June 21, 1995, Boddy Construction Company (Boddy) and MDOT entered into a contract on Project M 7703103559A (Project), which consisted of 2.2 miles of reconstruction along M-29

in St. Clair County. The Project was scheduled to be completed by October 10, 1996. The Plaintiff admits that this schedule was reasonable and achievable in its expectation, even though it encountered unexpected difficulties and delays.

Plaintiff argues that most of the delays were because they were continuously directed by MDOT to proceed with changes to the work as a result of site conditions. Plaintiff further argues that the site conditions caused them to rearrange their work plan, delay planned and scheduled work, and experience ineffective allocation and use of its personnel and equipment. It is Plaintiff's position that these changes resulted in extra work for which they should be compensated.

Defendant argues that the contract is governed by the 1990 Standard Specifications for Construction (1990 Specs), which expressly requires the contractor to notify the engineer in writing of the contractor's intention to make a claim for extra compensation before beginning the work that the contractor intends to base a claim for extra compensation and shall afford the engineer the opportunity to keep track of the costs. Failure of the contractor to give notification or to allow the engineer proper opportunity for keeping account of the actual costs involved constitutes a waiver of their claim for extra compensation.

It is undisputed the Boddy failed to provide prior written notice of its intent to file a claim for extra compensation before beginning the work upon which this claim is based. In response, Plaintiff argues that in order to avoid any additional delays, the work was performed without written compensation or work order at MDOT's request. Moreover, Plaintiff argues that only one written work order was issued by MDOT on a project that lasted more than two years and resulted in an $1,301,230.20 increase as a result of the changes. Additionally, Plaintiff argues that they began the

process of negotiating the resolution of its requests for payment for additional costs as early as October 1995 and that, over the years, a variety of requests for additional costs were approved and processed without presenting a written notice. The negotiations including the six remaining claims and others resulted in some claims being denied, some were approved in part or in whole and others were left open for additional consideration after clarification or additional information was provided. A large portion of the remaining dispute includes payment for geotextile-separator (fabric), which was used to prevent intermixing of dissimilar aggregate or soil layers, and payment for the removal and replacement of temporary aggregate.

ANALYSIS

Standard of Review

A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. All well-pled factual allegations are accepted as true and construed in a light most favorable to the nonmovant. A motion under MCR 2.116(C)(8) may be granted only where the claims alleged are "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." When deciding a motion brought under this section, a court considers only the pleadings. *Maiden v Rozwood,* 461 Mich 109; 597 NW2d 817 (1999).

A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion. The reviewing court should evaluate a motion under (C)(10) by considering the substantively admissible evidence actually proffered in opposition

to the motion. A reviewing court may not employ a standard citing the mere possibility that the claim might be supported by evidence produced at trial. A mere promise is insufficient under our court rules. *Maiden v Rozwood,* 461 Mich 109; 597 NW2d 817 (1999).

Applicable 1990 Standard Specifications for Construction Provisions (1990 Specs)

§1.04.02 requires the MDOT engineer to make "by work order or authorization" such changes that are necessary to satisfactorily complete the project. The work order provides for the direction on how the work is to proceed and the monetary amounts.

§1.04.03 requires the MDOT engineer to "furnish the contractor a proposal stating the location, kind, and estimated quantities of the extra work to be done."

§1.05.03 provides that deviations in the plans or work "will not be permitted without the written permission of the Engineer."

Doctrine of Waiver

The controlling law on this issue is well-established. A party to a contract may waive conditions or stipulations to favor that party and, thus, not require strict performance of the contract terms. *Jacob v Cummings,* 213 Mich 373; 182 NW 115 (1921). Waiver may be shown by evidence that a party knowing of the defect or breach, made or received payment according to contractual terms. *Holliday v Wright,* 134 Mich 608; 96 NW 949 (1903). In addition, the Michigan Supreme Court has stated:

> [A] waiver may be shown by proof of express language of agreement or inferably establised by such declarations, acts and conduct of the party against whom it is claimed as are consistent with a purpose to exact strict performance. *Strom-Johnson Construction Co v Riverview Furniture Store,* 227 Mich 55, 67-68; 198 NW 714 (1924).

Discussion

There is no dispute that the 1990 Specs dictate the applicable contract provisions in this matter. However, both parties are arguing 'doctrine of waiver' in support of their position. MDOT argues that it is entitled to summary disposition because the Plaintiff failed to provide written notice of intent to file a claim for extra compensation *before* beginning work on which he intended to base a claim. In response, Plaintiff admits that it failed to provide written notice of its intent to file a claim before it began work on which some of the claims are based, but argues that it was not required because MDOT waived strict performance by express language and conduct.

It is clear that Plaintiff had notice and understood the applicable contract provisions in this matter. In addition, the record reflects the following documentation:

1. October 25, 1995 letter from Horace Boddy, President of Boddy Construction, to MDOT indicating that "[i]n the future, extra work or work requiring materially altered methods or different material due to changed conditions or character of the work will not be commenced until receipt of a written work order directing performance of the work and authorizing agreed upon compensation for same will be required."
2. Front page of the MDOT Proposal, which ultimately became part of the contract, wherein Plaintiff agreed that compensation for extra work would be on a basis agreed upon *before* such work is done;
3. Page 111 of the MDOT Proposal, which states that "no credit [will be given] for laps, tucks, turn-ups, or wrinkles [in the fabric] will be made.";

4. April 16, 1997 letter from Horace Boddy, President of Boddy Construction, to MDOT giving notice under §1.05.12 for additional compensation for costs incurred in installing fabric against the back of a curb;

5. April 28, 1997 letter from MDOT to Horace Boddy responding to Mr. Boddy's April 16, 1997. MDOT's response denies additional compensation as untimely because the fabric was placed prior to filing a claim[1] and MDOT had no records to substantiate this claim;

6. Affidavit of Ralph Langdon, MDOT Resident Engineer on the Project, which indicates that he authorized fifty-seven (57) Change Order Recommendations on this Project for extra work and adjustments and that the force account records kept by MDOT on this project do not substantiate Plaintiff's claims;

7. Testimony of Ronald Boddy, son of Horace Boddy, which indicates that *before* Plaintiff's bid was submitted he was confused about where the [geotextile-separator] fabric went and so "assumed where it was supposed to go." In addition, Ronald Boddy testified that he does not remember whether he asked for a clarification from MDOT before the bid was submitted and was unsure why he or anyone else on behalf of Boddy did not seek clarification from MDOT before placement of the fabric;

8. Testimony of John Zimmer, Plaintiff's Project Manager on the Project and responsible for the day-to-day operations on the job, which indicates that he was never told that written notice to file a claim was not required and that he did not

---

[1] Letter indicates that the "Geotextile Separator [fabric] was placed in 1995 and 1996."

recall keeping any records that "would indicate the number of times aggregate was removed or replaced in any particular driveway"; and

9. Testimony of Horace Boddy, which indicates that Plaintiff did not seek clarification from MDOT on any job item before submitting its bid and that he had no documentation to support the amount asked for in the Complaint. Mr. Boddy further testified that any tape recordings of weekly meetings where discussions about additional compensation were at issue were "taped over" and that he "believed" that meeting minutes may be available to substantiate his allegation that "no notice has to be given . . . we [MDOT] is going to keep track of you and pay you in some way." Mr. Boddy further testified that, with regard to the Notice of Claim requirement, he never asked for clarification whether it was still required, that he never told MDOT that he was going to stop working unless he received something in writing about payment for additional compensation issues in dispute.

Based on the above it is clear to this Court that Plaintiff understood that prior approval was needed before additional compensation for work performed would be paid. It is also clear that, with respect to the issues in dispute, Plaintiff did not receive prior approval. This Court is not persuaded by Plaintiff's allegations that MDOT representatives continuously advised him that he would be paid later. Testimony on behalf of the Plaintiff indicates that he was never told the Notice of Claim requirement was not required, that he never asked for a clarification before submitting a bid and just "assumed where it [the fabric] was supposed to go" and that he never asked for a clarification as to

whether a Notice of Claim was required during discussions concerning performance of additional work . The Court views this testimony as fatal to Plaintiff's claims.

In *Banwell v Risdon,* 258 Mich 274; 241 NW 796 (1932), the Michigan Supreme Court held that verbal modification to a written contract requires mutual consent. Here, like *in Banwell,* the contract provides that all changes, for which additional compensation is requested, shall be received prior to approval. As previously noted, there is no dispute that MDOT did not consent to any of the work for which Plaintiff argues he is entitled to compensation.

A reviewing court may not employ a standard citing the mere possibility that the claim might be supported by evidence produced at trial.[2] Therefore, testimony that there may be minutes available to support Plaintiff's allegation that he was told he would be paid later is not sufficient in this matter. Moreover, Plaintiff cannot provide any records that they kept to substantiate the amount of the additional compensation. Testimony of Horace Boddy that he kept all of it "in his head" is incomprehensible.

ORDER

IT IS ORDERED that Defendant's Motion for Summary Disposition is **GRANTED.**

Dated: September 17, 2001

Hon. Peter D. Houk
Court of Claims Judge

[2] *Maiden v Rozwood,* 461 Mich 109; 597 NW2d 817 (1999)(A mere promise is insufficient under our court rules.).

PROOF OF SERVICE

I certify that I mailed a true copy of the above **OPINION AND ORDER** upon all attorneys of record or parties by placing said copy in the first class mail with postage prepaid from Lansing, Michigan, on September 17, 2001.

Ann M. Baird
Judicial Assistant

cc: Lawrence M. Scott
David D. Brickey

A TRUE COPY
CLERK OF THE COURT
30th JUDICIAL CIRCUIT COURT

(2)

STATE OF MICHIGAN

COURT OF APPEALS

BODDY CONSTRUCTION COMPANY, INC.,

Plaintiff-Appellant,

v

MICHIGAN DEPARTMENT OF TRANSPORTATION,

Defendant-Appellee.

UNPUBLISHED
February 28, 2003

No. 237471
Court of Claims
LC No. 00-017592-CM

Before: Sawyer, P.J., and Jansen and Donofrio, JJ.

PER CURIAM.

Plaintiff appeals as of right the opinion and order granting the motion for summary disposition brought by defendant Michigan Department of Transportation ("MDOT") under MCR 2.116(C)(8) and (10). We reverse and remand.

In this case, plaintiff is seeking $724,954.66 in additional compensation for highway reconstruction work performed along M-29 in St. Clair County. According to defendant, the construction contract expressly prohibited extra compensation in this case because plaintiff failed to provide timely notice to the MDOT engineer about its intention to seek additional compensation. Plaintiff counters that it was entitled to extra compensation because defendant waived this contractual provision. The trial court, without specifying the subrule under which it granted defendant's motion for summary disposition, found that plaintiff was not entitled to extra compensation because there was nothing in the record to indicate that defendant had given prior approval as required under the contract.

Because the trial court pierced the pleadings in granting summary disposition in defendant's favor, we review the grant of summary disposition under MCR 2.116(C)(10). In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), this Court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in a light most favorable to the nonmoving party. *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999). As clarified by the Supreme Court in *Maiden*:

> The reviewing court should evaluate a motion for summary disposition under MCR 2.116(C)(10) by considering the substantively admissible evidence actually proffered in opposition to the motion. A reviewing court may not employ a standard citing the mere possibility that the claim might be supported by evidence

produced at trial. A mere promise is insufficient under our court rules. [461 Mich at 121.]

In this case, the parties entered into a highway contract, which was governed by the 1990 Standard Specifications for Construction. Under § 1.05.12(a), the Notice of Claim provision, "the Contractor shall notify the [MDOT] Engineer in writing of the Contractor's intention to make claim for such extra compensation before beginning work on which the Contractor intends to base a claim. . . ." It is undisputed that plaintiff failed to provide the MDOT engineer in question with written notice of its intent to file a claim before beginning the work upon which plaintiff's claim is based.

Nevertheless, we agree with plaintiff's contention that defendant waived strict compliance with § 1.05.12. See *Jacob v Cumings*, 213 Mich 373; 182 NW 115 (1921). Here, the record indicates that defendant waived strict compliance with the written notice requirement by agreeing with plaintiff to resolve disputes arising with the plans and specifications of the project without the need of filing a written notice of intent to file a claim. Thus, the trial court erred, as a matter of law, in ruling that defendant did not waive strict compliance with § 1.05.12(a) of the 1990 Standard Specifications for Construction.

Further, there was a genuine issue of material fact whether plaintiff was entitled to additional compensation for its highway reconstruction work. Specifically, although defendant maintains that plaintiff has failed to attach any records substantiating its alleged claims, we note that Horace Boddy, in his deposition testimony, indicated that there were handwritten notations documenting the cost for excavating and disposing of temporary aggregate off site in the amount of $91,407.37. On remand, the trial court is thus instructed to determine whether plaintiff was entitled to additional compensation and in what amount.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Kathleen Jansen
/s/ Pat M. Donofrio

Court of Appeals, State of Michigan

ORDER

Boddy Construction Co Inc v Michigan Dep't of Transportation

Docket No. 237471

LC No. 00-017592-CM

David H. Sawyer
Presiding Judge

Kathleen Jansen

Pat M. Donofrio
Judges

The Court orders that the motion for rehearing is DENIED.

Presiding Judge

STATE OF MICHIGAN COURT OF APPEALS

A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

APR 18 2003
Date

Sandra Schultz Mengel
Chief Clerk

STATE OF MICHIGAN

COURT OF APPEALS

LANZO CONSTRUCTION COMPANY,

Plaintiff-Appellant,

v

MICHIGAN DEPARTMENT OF TRANSPORTATION,

Defendant-Appellee.

UNPUBLISHED
September 27, 1996

No. 181944
LC No. 94-15215-CM

Before: Wahls, P.J., and Fitzgerald and L.P. Borrello,* JJ.

PER CURIAM.

Plaintiff appeals as of right the order granting summary disposition in defendant's favor pursuant to MCR 2.116(C)(10) on plaintiff's breach of contract claim. We affirm.

Plaintiff contracted with defendant to perform underground utility relocation work in connection with an expansion of Cobo Hall. The project was to be completed on October 1, 1986. Because of numerous change orders, defendant extended the completion date to May 11, 1988. The project was timely completed.

In a letter dated November 8, 1990, plaintiff submitted a written claim for "extended overhead, interest, and interest on unpaid items of construction from 5/31/87." Plaintiff filed suit against defendant alleging, inter alia, that a breach of contract occurred when defendant failed to compensate plaintiff in the amount of $580,273.76 for overhead expenses incurred because of the extended completion date.

The dispute centers upon the interpretation of § 1.05.12 of the Michigan Department of Transportation (MDOT) 1984 Standard Specifications for Construction, which states:

> *In case the Contractor deems extra compensation is due for work or materials not clearly covered in the contract, or not ordered by the Engineer as extra work, or due to changed or altered conditions (as defined under Changes in Quantities, Plans, or Character of the Work, 1.04.02), the contractor shall notify the Engineer in writing of the Contractor's intention to make claim for such extra*

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* Circuit judge, sitting on the Court of Appeals by assignment.

compensation before beginning work on which the Contractor intends to base a claim and shall afford the Engineer every facility for keeping actual cost of the work. The Contractor and the Engineer shall compare records and bring them into agreement at the end of each day. *Failure on the part of the contractor to give such notification or to afford the Engineer proper facilities for keeping strict account of actual costs will constitute a waiver of the claim for such extra compensation* except that consideration will be given to claims to the extent that they are substantiated by Department records. *The determination of extra compensation made by the Department, where the Contractor has failed to give proper notice of his claim for extra compensation* as provided herein or has failed to afford the Engineer proper facilities for keeping strict account of actual costs, *shall be final and binding on the Contractor.* The filing of such notice by the Contractor and the keeping of cost by the Engineer shall not in any way be construed to establish the validity of the claim. *When the work has been completed, the Contractor shall file the claim for extra compensation with the Engineer. Such claims shall be filed with the Engineer in a timely manner by no later than 60 days after the contract is completed.* A written decision will be given to the Contractor in a timely manner, regarding the approval, partial approval, or disapproval of the Contractor's claim for extra compensation. The Department will determine procedures for reviewing the Contractor's claim. [Emphasis added.]

The parties do not dispute that the MDOT 1984 Standard Specifications for Construction are part of the contract.

On appeal, plaintiff argues that § 1.05.12 is ambiguous and, therefore, an issue of fact exists regarding whether the provision applies to overhead claims. Plaintiff's claim is premised upon the argument that § 1.05.12 is ambiguous regarding whether "overhead" is included within the terms "work" and "materials." Plaintiff essentially contends that overhead costs are not included within those definitions and, therefore, the section does not apply and plaintiff need not satisfy the notice requirements.

The initial question whether contract language is ambiguous is a question of law. If the contract language is clear and unambiguous, its meaning is a question of law. *Port Huron Education Ass'n v Port Huron Area School Dist*, 452 Mich 309, 323; 550 NW2d 228 (1996). Where the contract language is unclear or susceptible to multiple meanings, interpretation becomes a question of fact. *Id.*

In this case, the trial court concluded that the language of the contract was unambiguous as a matter of law. After reviewing the contract, we agree.

Section 1.05.12 provides that "[i]n case the Contractor deems extra compensation is due for *work or materials* not clearly covered in the contract, . . . the Contractor shall notify the Engineer in writing of the Contractor's intention to make claim for such extra compensation before beginning work on which the Contractor intends to base a claim." Plaintiff points to the

definition of "work" as set forth in the specifications, arguing that it does not include overhead expenses:

> Work shall mean the furnishing of all labor, materials, equipment, and other incidentals necessary or convenient to the successful completion of the project and the carrying out of all the duties and obligations imposed by the contract.

The language is only "ambiguous" to the extent that plaintiff failed to provide the contract and pertinent portions of the specifications to the Court. It appears that defendant includes the cost of overhead in its determination of the costs of labor. Section 1.09.05(b) of the 1984 Specifications provides the following compensation for "labor":

> For all labor and for all craft foremen directly engaged in the specific work, the contractor will be paid the actual rate of wages and the number of hours paid . . . ***to which sum 26 percent will be added (this sum includes a one percent allowance for the Single Business Tax)***.

In addition, that section also provides that defendant will pay a contractor for workers' compensation insurance, liability insurance, social security, and other similar costs "at actual cost, to which sum 20 percent will be added." The additional sums afforded by § 1.09.05(b) are apparently provided to compensate the contractor for overhead, which includes, among other things, taxes. Since "overhead" is included in the determination of "labor," and "labor" is included in the definition of "work," any request for additional compensation for "overhead" must comply with the mandates of § 1.05.12.

Section 1.05.12 requires a contractor to notify the engineer in writing of the intention to claim extra compensation "before beginning work on which the Contractor intends to base a claim." A contractor's failure to provide the engineer with the required notification "will constitute a waiver of the claim for such extra compensation." Although plaintiff claimed below that it provided notification, it failed to attach documentation to support its claim.[1] Further, plaintiff failed to submit the eighty-seven work orders in support of its claim that the written work orders constitute an implied claim for extended overhead. Plaintiff failed to sustain its burden of showing a genuine issue of material fact regarding whether it gave written notice as required under § 1.05.12. *Skinner v Square D Co*, 445 Mich 153, 160; 516 NW2d 475 (1994). Because that section requires written notice to preserve a claim for extra compensation, the trial court properly granted summary disposition for defendant.

Affirmed.

/s/ Myron H. Wahls
/s/ E/ Thomas Fitzgerald
/s/ Leopold P. Borrello

[1] The evidence showed that the November 8, 1990, letter was the first *written* notice of such a claim.

STATE OF MICHIGAN
IN THE SUPREME COURT

BODDY CONSTRUCTION COMPANY, INC.,

Appellee,

v

STATE OF MICHIGAN, MICHIGAN DEPARTMENT OF TRANSPORTATION,

Appellant.
_____/

Michigan Supreme Court No.

Court of Appeals No. 237471

Court of Claims No. 00-17592-CM

NOTICE OF HEARING

To: Gary Hansz
Attorney for Appellee

PLEASE TAKE NOTICE that the attached Application for Leave to Appeal will be brought on for hearing in the Michigan Supreme Court on Tuesday, June 3, 2003.

Respectfully submitted,

Michael A. Cox
Attorney General

Thomas L. Casey (P24215)
Solicitor General
Counsel of Record

Kathleen A. Gleeson

Patrick F. Isom (P15357)
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Date: May 9, 2003
lit/2000/2000052938C Notice of Hrg

STATE OF MICHIGAN
IN THE SUPREME COURT

BODDY CONSTRUCTION COMPANY, INC.,

Appellee,

v

STATE OF MICHIGAN, MICHIGAN DEPARTMENT OF TRANSPORTATION,

Appellant.
_____/

Michigan Supreme Court No.

Court of Appeals No. 237471

Court of Claims No. 00-17592-CM

PROOF OF SERVICE

On May 9, 2003, a copy of Appellant's Application for Leave to Appeal and a Notice of Hearing, in the above-captioned matter, in a sealed envelope and addressed to:

Lawrence M. Scott
Gary A. Hansz
12900 Hall Road, Ste. 350
Sterling Heights, MI 48313-1151
Attorneys for Appellee

Clerk of the Court
Michigan Court of Appeals
Hall of Justice
925 West Ottawa Street
P.O. Box 30022
Lansing, MI 48909-7522

Clerk of the Court
Court of Claims
313 W. Kalamazoo Street
Lansing, MI 48933

was deposited by the undersigned via U.S. mail.

Cindy Armbruster

lit/2000/2000052938C Pproof

STATE OF MICHIGAN
DEPARTMENT OF ATTORNEY GENERAL

P.O. BOX 30050
LANSING, MICHIGAN 48909

MIKE COX
ATTORNEY GENERAL

May 9, 2003

Clerk of the Court
Michigan Supreme Court
Hall of Justice
925 West Ottawa Street
P.O. Box 30052
Lansing, MI 48909-7522

Dear Clerk:

Re: *Boddy Construction Company, Inc v MDOT*
Supreme Court No.
Court of Appeals No. 237471
Lower Court No. 00-17592-CM

Enclosed for filing please find an original and eight (8) copies of Appellant MDOT's Application for Leave to Appeal. Please return a file stamped copy with the messenger delivering same. Also enclosed is the Notice of Hearing together with a Proof of Service on opposing counsel and on the Court of Appeals clerk and the trial court clerk.

Thank you for your assistance.

Very truly yours,

Kathleen A. Gleeson
Assistant Attorney General
Transportation Division
(517) 373-3445

KAG/caa
Enclosures
cc: Gary Hansz
Clerk, Court of Appeals
Clerk, Court of Claims
lit/2000/2000052938C Lclerk